In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF REHEARING

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1. In *United States* v. *Allen-Bradley Company*, No. 78, decided January 22, 1957, this Court held that Section 124 (f) of the Internal Revenue Code of 1939, as amended, granted authority to the appropriate officials "to issue certificates, as in this case, certifying that only a part of the cost of essential wartime improvements was necessary to the national defense" (slip opinion, p. 6). The same holding was made in the companion case of *National Lead Co.* v. *Commissioner*, No. 124.

This case is identical with *Allen-Bradley* and *National Lead* in every relevant respect. The language of the certificate issued in this case, certifying that only a part of the cost of the property was necessary

to the national defense, is, in relation to the legal issues involved, the same as that in the certificates in the *Allen-Bradley* and *National Lead* cases. And, admittedly, the reasons which in this case prompted the administrators to issue a certificate for only a part of cost are precisely the same as those that led to the issuance of the partial certificates in the *Allen-Bradley* and *National Lead* cases, namely, that the property would possess post-war utility to the taxpayer.

Accordingly, the decisions in the *Allen-Bradley* and *National Lead* cases are controlling and compel the conclusion that here, too, the tax deductions are to be computed in accordance with the limitations contained in the certificate. Since the decision of the Court of Claims, allowing a deduction based on the full cost of the property in disregard of the limitations of the certificate, was based on an erroneous ruling of law (reiterated by it in *Allen-Bradley*), namely, that Section 124 (f) did not authorize the issuance of partial certificates, and since that holding has now been authoritatively rejected by this Court, reversal of its decision in the instant case is no less warranted than in *Allen-Bradley*.

The taxpayer contends, however, that this case is distinguishable from *Allen-Bradley* and *National Lead;* that those decisions are not controlling; and that "the decision below is plainly correct * * * and should not be disturbed".

The Government submits that the taxpayer's attempt to distinguish *Allen-Bradley* and *National Lead* is clearly futile. The asserted distinctions are, on their face, without significance. In essence, taxpayer

claims that, because it began the construction of the facilities prior to October 5, 1943, and because paragraph 3 (a) of Executive Order 9406, 8 Fed. Reg. 16955, provided that applications with respect to such facilities should be governed by the Regulations of the Secretaries of War and Navy in effect prior to October 5, 1943, this case is essentially different from *Allen-Bradley* and *National Lead,* where the construction began after October 5, 1943. But this factual difference is of no consequence unless the taxpayer is also correct in its basic contention of law that the Board's action in issuing a partial certificate was in violation of the governing Regulations and the Executive Order.

It is now datum, as a result of the Court's decisions in *Allen-Bradley* and *National Lead,* that the statute granted authority to issue partial certificates. Taxpayer must therefore attempt to sustain the burden that, though authorized by statute, the certifying officials had, by Regulations, precluded themselves from exercising this authority prior to the promulgation of Executive Order 9406 and, if they had not, that the Executive Order prohibited them from exercising their statutory authority in situations where construction had begun prior to October 5, 1943, and where, as here, the application for a certificate was not filed until later (November 16, 1943). For the reasons briefly summarized below, we think it abundantly clear that this burden has not been, and cannot be, met.

(a) From the very beginning, those charged with responsibility recognized their statutory authority to

issue partial certificates in appropriate circumstances where they concluded that only part of the cost of a particular facility was necessary in the national defense. Thus, Section 5 (a), War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Reg. 4233 (1942) stated that necessity certificates were conclusive evidence that the facilities were necessary in the interest of the national defense "up to the percentage therein designated * * *." And, except for the inclusion of the specific percentage, the certificate in this case, as in *Allen-Bradley* and *National Lead*, follows the identical language of Section 5 (a) of these Regulations, which were cited by this Court as showing that the administrative officials had consistently interpreted the statute as authorizing such partial certificates. (*Allen-Bradley*, slip opinion, p. 4, footnote 2.) And the Treasury Regulations, issued soon after the enactment of the Second Revenue Act of 1940, made it crystal clear that the administrators assumed that they possessed and would exercise the authority to issue partial certificates. Section 19.124–6, as added by T. D. 5016, 1940–2 Cum. Bull. 119. These Regulations, too, were cited for the same proposition in the *Allen-Bradley* opinion (*ibid.*).

The taxpayer does not point to a single provision of the War and Navy Department Regulations, which govern this case, to document its assertion that the partial certification here was "in the teeth" of these Regulations. The provisions relied on by this Court conclusively show the contrary, namely, that the administrators did not voluntarily restrict themselves

from exercising the full measure of authority granted by Section 124 (f). Whether that authority had or had not been exercised prior to October 5, 1943, in situations where post-war utility appeared probable is not important here, since it depended on the factual circumstances then existing; the only question is whether the legal authority to do so existed. It would be extraordinary to find evidence that such authority, vested by statute, had been voluntarily relinquished or waived by the responsible administrators; and such evidence would doubtless have to be clear and specific to warrant so exceptional a conclusion. But taxpayer can find none.

(b) There is similarly no basis for the taxpayer's assumption that Executive Order 9406 was intended to preclude the certifying officials, in passing on future applications filed with respect to facilities which were then under construction, from issuing partial certificates when they deemed that the circumstances, including the probability of post-war utility to the taxpayer, warranted such action. The Executive Order contains no prohibition, explicit or implied, to that effect; and here too it may reasonably be presumed that if there had been an intent to curtail existing authority, it would have been clearly stated. The fact that sub-paragraph (a) and (b) of paragraph 3 of the Executive Order drew a distinction between facilities whose construction was begun before October 5, 1943 and facilities constructed after that date, does not warrant the taxpayer's assumption that the certifying officials would thereafter be precluded from

issuing partial certificates in the former situation and would only be permitted to do so in the latter. Obviously, the distinction was drawn in the Order because thereafter no certificates would be issued for proposed facilities except *in advance* of construction, a requirement which, out of fairness, was not to be imposed where, in reliance on prior regulations, construction had been begun prior to application for a certificate.

The only assurance which the Executive Order gave to the taxpayer was that, since it commenced construction of the project prior to October 5, 1943, a timely, subsequent application would be considered on its merits. Neither before nor after the Executive Order did the taxpayer have any assurance that the project already under construction would qualify for certification or that its full cost would be certified as necessary in the interest of national defense. The Order left the administrators wholly free to make such determination as the particular circumstances required: they could issue a certificate for the full cost, or none at all, or, as in this case, for only that part of the cost which they deemed necessary in the interest of the national defense.[1]

In sum, the present case is indistinguishable in its pertinent facts from *Allen-Bradley* and *National Lead*.[2]

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[1] Although the parties made no point of this, it should be noted that in *Allen-Bradley* one of the "partial" certificates was subject to the same paragraph of Executive Order 9406 which governs this case. (See R. 5–6 in No. 78, this Term.)

[2] Even if the distinctions asserted by the taxpayer are germane, it would not follow, as the taxpayer tacitly assumes, that it would

2. The taxpayer reiterates its contention that the petition for certiorari was filed too late. Since this contention has already been answered (Reply Brief on Motion of the United States for Leave to File a Petition for Rehearing and Petition for Rehearing, pp. 4–6), no further discussion is required here. We shall limit our observations to the taxpayer's attempt (Br. 16) to relate this case to the pending petition for a writ of certiorari (No. 761) in *United States* v. *F. & M. Schaefer Brewing Co.*, 236 F. 2d 889 (C. A. 2).

The opinion of the Court of Claims in this case, promulgated on March 1, 1955 (entry of which the taxpayer contends started the time for a petition for a writ of certiorari under 28 U. S. C. 2101 (c)) expressly stated that "*Entry of judgment is suspended* to await the filing by the parties of a stipulation showing the amount due." [Italics added.]

The Second Circuit's decision in the *Schaefer Brewing* case does not begin to support the contention that the opinion of the Court of Claims entered in this case on March 1, 1955, constituted a final judgment. Indeed, the *Schaefer* opinion expressly recognizes that (p. 892), "Of course it lies in the judge's power to postpone finality whether because he has not yet reached the point of judgment or whether *because he wants to take time—with the help of counsel or with-*

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be entitled to amortize the full cost of the property, in view of the fact that there never was an administrative determination that the full costs were necessary in the interest of the national defense. The Government's argument in this respect was sustained by the Second Circuit in the *National Lead* case, but in view of the disposition of the cases made by this Court was not reached on review here.

out—to embody the result in his own prepared judgment." [Italics added.] By specifically suspending the entry of judgment to await the stipulation of the parties agreeing on the amount owing, the Court of Claims in this case did precisely what the *Schaefer* case recognizes to be the right of a district court under the Federal Rules, i. e., it postponed finality to embody the result in its own prepared judgment. That finality was not embodied in a judgment in this case until March 30, 1955, and, consequently, the petition was timely.

3. In view of this Court's order of June 11, 1956 (351 U. S. 980), which vacated the order of December 5, 1955 (350 U. S. 919) denying the petition for rehearing, and continued the petition for rehearing, and in view of this Court's further order of November 13, 1956 (352 U. S. 905) denying the taxpayer's motion to vacate the order of June 11, 1956 and to dismiss the petition for rehearing, we do not believe it necessary to comment on the taxpayer's renewed contention that these actions of the Court were inappropriate. In its petition for rehearing filed in November 1955, the Government called attention to the *National Lead* case, then pending before the Second Circuit and involving the identical issue here presented, and requested the Court to defer further consideration of this case pending the Second Circuit's decision in *National Lead*. The petition for rehearing requested that, in the interests of expeditious determination of the issue as well as protection of the revenue, the Court should keep this case open to await the outcome of the *National Lead* case. As we view this Court's

orders of June 11, 1956 and November 13, 1956, they in effect granted the Government's request in its petition for rehearing—the timeliness of which is undisputed—that the matter be continued. Indeed, the Court's order of June 11, 1956 explicitly stated that "the petition for rehearing is continued." In view of the unique circumstances of this litigation, therefore, we do not think that a grant of the petition for rehearing would raise the broad questions discussed by taxpayer.

CONCLUSION

The petition for rehearing should be granted, and a writ of certiorari should issue. Since this case is plainly governed by the Court's decisions in the *Allen-Bradley* and *National Lead* cases, the judgment below should be reversed on the authority of those decisions.

Respectfully submitted.

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